IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**RULING: DEFENSE MOTION**
v.	)	**TO DISMISS – UNREASONABLE**
	)	**MULTIPLICATION OF CHARGES**
MANNING, Bradley E., PFC	)	
U.S. Army, (b) (6)	)	
HHC, U.S. Army Garrison	)	
Joint Base Myer-Henderson Hall	)	DATED: 25 April 2012
Fort Myer, Virginia 22211	)	

Defense moves to dismiss certain charges and specifications based upon unreasonable multiplication of charges (UMC). Government opposes. After considering the pleadings, the classified enclosure presented by the defense, and argument of counsel, the Court finds and concludes the following:

Findings of Fact: The Government stipulates to the facts set forth in the Defense motion, with a singular exception. The Court adopts the following relevant facts:

1. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of conduct prejudicial to good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting government property, and two specifications of knowingly exceeding authorized access to a government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010). The case has been referred to a general court martial by the convening authority.

2. The Defense argues the following 4 categories of specifications are an UMC against PFC Manning. The specifications are identified in relevant part:

Category 1: Article 134 (18 U.S.C. 641) and Article 134 (18 U.S.C. 793(e))

(A) Charge II, specifications 4 and 5 involving the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States government:

Specification 4 of Charge II: Article 134 (18 U.S.C. 641) – PFC Manning did at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 5 January 2010," steal, purloin, or knowingly convert "the Combined Information Data Network Exchange Iraq database containing more than 380,000 records belonging to the United States government," in violation of 18 U.S.C. Section 641 and Article 134.

Specification 5 of Charge II: Article 134 (18 U.S.C. 793(e))- PFC Manning having unauthorized possession of classified Combined Information Data Network Exchange Iraq database records, did, at the same place specified in Specification 4 between on or about 31 December 2009 and on or about 9 February 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of 18 U.S.C. Section 793(e) and Article 134.

(B) Charge II, specifications 6 and 7 involving the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States government:

Specification 6 of Charge II: Article 134 (18 U.S.C. 641) – PFC Manning did at or near Contingency Operating Station Hammer, Iraq, between on or about 31 December 2009 and on or about 8 January 2010," steal, purloin, or knowingly convert "the Combined Information Data Network Exchange Afghanistan database containing more than 90,000 records belonging to the United States government," in violation of Section 641 and Article 134.

Specification 7 of Charge II: Article 134 (18 U.S.C. 793(e)) - PFC Manning did having unauthorized possession of classified records contained on the Combined Information Data Network Exchange Afghanistan database, did, at the same place specified in Specification 6 between on or about 31 December 2009 and on or about 9 February 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

(C) Charge II, specifications 8 and 9 involving the United States Southern Command database containing more than 700 records belonging to the United States government:

Specification 8 of Charge II: Article 134 (18 U.S.C. 641) – PFC Manning did at or near Contingency Operating Station Hammer, Iraq, on or about 8 March 2010," steal, purloin, or knowingly convert "a United States Southern Command database containing more than 700 records belonging to the United States government," in violation of Section 641 and Article 134.

Specification 9 of Charge II: Article 134 (18 U.S.C. 793(e)) - PFC Manning having unauthorized possession of classified records contained on the database specified in Specification 8, did, at the same place specified in Specification 8 between on or about 8 March 2010 and on or about 27 May 2010, willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

Category 2: Article 134 (18 U.S.C. 641) and 18 U.S.C. 1030(a)(1)

(A) Charge II, specifications 12 and 13 involving the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States government:

Specification 12 of Charge II: Article 134 (18 U.S.C. 703(e)) - PFC Manning did at or near Contingency Operating Station Hammer, Iraq, between on or about 28 March 2010 and on or about 4 May 2010," steal, purloin, or knowingly convert "the Department of State Net-Centric Diplomacy database containing more than 250,000 records belonging to the United States government," in violation of Section 641 and Article 134.

Specification 13 of Charge II: Article 134 (18 U.S.C. 1030(a)(1)) - PFC Manning, at the same place specified in Specification 12 between on or about 28 March 2010 and on or about 27 May 2010, knowingly exceeded his authorized access on a Secret Internet Protocol Router computer, obtained classified Department of State cables determined to require protection against unauthorized disclosure, and willfully communicated, delivered, transmitted, or caused to be communicated, delivered, or transmitted, these cables to a person not entitled to receive them with reason to believe that these cables so obtained could be used to the injury of the United States, in violation of 18 U.S.C. Section 1030(a)(1) and Article 134.

Category 3: Charges Occurring in a single transaction on the same day:

(A) Charge II, specifications 4, 5, 6, and 7.

(B) Charge II, specifications 10 and 11 (18 U.S.C. 793(e)).

Specification 10 of Charge II: Article 134 (18 U.S.C. 793(e)) - PFC Manning, having unauthorized possession of classified records relating to a military operation in Farah Province, Afghanistan occurring on or about 4 May 2009, did, "at or near Contingency Operating Station Hammer, Iraq, between on or about 11 April 2010 and on or about 27 May 2010," willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, these records to a person not entitled to receive them with reason to believe that the records could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

Specification 11 of Charge II: Article 134 (18 U.S.C. 793(e)) - PFC Manning, having unauthorized possession of a file containing a video relating to the national defense, did, "at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 8 January 2010," willfully communicate, deliver, transmit, or cause to be communicated, delivered or transmitted, this file to a person not entitled to receive it with reason to believe that the file could be used to the injury of the United States or to the advantage of any foreign nation, in violation of Section 793(e) and Article 134.

The Law:

1. RCM 307(c)(4) states that "[w]hat is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person."[1] The central tenet of the doctrine is to "promote fairness considerations separate from an analysis of the statutes, their elements, and the intent of Congress." *United States v. Quiroz*, 55 M.J. 334, 337 (C.A.A.F. 2001), discussing *United States, v. Teters*, 37 M.J. 370 (CMA 1993).

2. The Court of Appeals for the Armed Forces in *U.S. v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012) endorsed the following non-exclusive factors, commonly known as *Quiroz* factors, as a guide for military judges to consider when the defense objects that the Government has unreasonably multiplied the charges:

(1) whether each charge and specification aimed at distinctly separate criminal acts?
(2) whether the number of charges and specifications misrepresent or exaggerate the accused's criminality?
(3) whether the number of charges and specifications *unfairly* increase the appellant's punitive exposure?
(4) Whether there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

None of the factors are pre-requisites. One or more factors may be sufficient to establish an UMC based on prosecutorial over-reaching. A singular act may implicate multiple and significant criminal law interests, none necessarily dependent upon the other. UMC may apply differently to findings than to sentencing. A charging scheme may not implicate the *Quiroz* factors in the same way that sentencing exposure does. In such a case, the nature of the harm requires a remedy that focuses more appropriately on punishment than findings. *Campbell*, 71 M.J. 23, 24.

3. The Court must, therefore scrutinize the prosecutor's charging determinations as "the prohibition against unreasonable multiplication of charges addresses those features of military law that increase the potential for overreaching in the exercise of prosecutorial discretion." *Id.* The application of the *Quiroz* factors, at bottom, involves a "reasonableness determination, much like sentence appropriateness." *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010).

4. Where a trial court finds an unreasonable multiplication of charges, dismissal of the multiplied charges is an available remedy. *United States v. Roderick*, 62 M.J. 425, 433 (C.A.A.F. 2006). Consolidation of the unreasonably multiplied charges is also a remedy available to the trial court. *United States v. Gilchrist*, 61 M.J. 785, 789 (A. Ct. Crim. App. 2005).

ANALYSIS:

Category I: The 18 U.S.C. § 641 and 18 U.S.C. § 793(e) Specifications

[1] However, the RCM are not so inflexible as to fail to recognize that situations may arise "when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses." *See* discussion to RCM 307(c)(4).

(Specifications 4 & 5, 6 & 7, and 8 & 9, of Charge II)

1. The 18 U.S.C. § 641 and 18 U.S.C. § 793(e) specifications address distinctly separate criminal acts. The 18 U.S.C. § 641 offenses are aimed at the theft of government property, in the present case records contained in government-owned databases, while the gravamen of the 18 U.S.C. § 793(e) offenses is the transmittal of national defense information to unauthorized persons. The distinct nature of the paired specifications is illustrated by comparing the elements of the offenses. *See U.S. v.Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (referring to the court's multiplicity analysis in deciding that the specifications at issue were aimed at distinctly separate criminal acts; charging the forgery of 16 checks and four indorsements in two specifications were aimed at as a fair and reasonable exercise of prosecutorial discretion). In order to prove the accused violated 18 U.S.C. §641 Specifications 4, 6, and 8 the United States must establish that the accused stole, purloined, or knowingly converted United States Government property. In order to prove the accused violated 18 U.S.C. §793(e) Specifications 5, 7, and 9 the United States must establish that the accused communicated, delivered, or transmitted national defense information to a person not entitled to receive it. The Defense argument that each violation of 18 U.S.C. § 641 was simply the "first step" in a violation of 18 U.S.C. § 793(e) has been discounted by the appellate courts in the context of larceny and false claims convictions *United States v. Chatman*, 2003 WL 25945959 (A. Ct. Crim. App. June 13, 2003) (unpublished) (noting that the specific intent to deprive the United States of its military property is a *mens rea* unnecessary for the Article 132 offenses). *See also Campbell* (recognizing that a singular act may implicate multiple and significant criminal interests not dependent on the others). Each specification alleging a violation of 18 U.S.C. § 641 is directed at misconduct wholly independent of its paired specification alleging a violation of 18 U.S.C. § 793(e). As in *Campbell,* in this case, the crime of theft of government records can be complete whether or not the accused willfully "communicated.....transmitted" the records to persons not entitled to receive them.

2. The number of charges and specifications do not misrepresent or exaggerate the accused's criminality. A facial analysis of the charge sheet shows that Specifications 4, 6, 8, and 12 of Charge II allege a theft of government property from four different databases (the Combined Information Data Network Exchange Iraq database, the Combine Information Data Network Exchange Afghanistan database, a United States Southern Command database, and the Department of State Net-Centric Diplomacy database). Moreover, the volume of records alleged to have been stolen augers in favor of the Government (more than 380,000 records; more than 90,000 records; more than 700 records; more than 250,000 records).

3. The number of charges and specifications do not unfairly increase the accused's punitive exposure as an UMC for findings. Charging the accused with knowingly giving intelligence to the enemy, delivering national defense information to those unauthorized to receive it, theft of government property, and conduct prejudicial to good order and discipline, based on the accused's posting of classified information to a publicly accessible website, totaling hundreds of thousands of records, over the span of several months, is not an unreasonable multiplication of charges. The Article 104 offense has a maximum punishment of life confinement without the eligibility for parole. The Government could have broken up the single specification into multiple specifications based on specific Internet postings. *See Campbell,* 71 at 25. The

maximum possible punishment for a conviction under either 18 U.S.C. § 641 or 18 U.S.C. § 793(e) is ten years incarceration for each specification. Therefore, dismissal of Specifications 4, 6, and 8 would reduce the accused's punitive exposure by 30 years. In this case, considering the alleged volume of government and classified records involved, the accused's punitive exposure has not been unfairly increased for purposes of UMC for findings. *See United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010).

4. There is no evidence of prosecutorial overreaching or abuse in the drafting of charges. The Defense points to the charge sheet to support its contention that the government is "pil[ing] on the charges against PFC Manning in order to increase the likelihood of a severe sentence if he is convicted." Def. Mot. at 7. As the Court has already found, the charges are distinct in nature and proof and involve voluminous Government records. The Defense argues the Government has pushed 18 U.S.C. § 641 "to the edge of its permissible application" as it relates to national defense information, relying on the separate view expressed by Judge Winter in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). This argument has been rejected by the Second, Fourth, and Sixth Circuits. *United States v. Girard,* 601 F.2d 69, 70-71 (2nd Cir. 1979); *United States v. Fowler*, 932 F.2d 306 (4th Cir. 1991); *United States v. Jeter,* 775 F.2d 670, 680-82 (6th Cir. 1985). Even if the Government mischarged the accused with violations of 18 U.S.C. § 641, no relief would be warranted under the theory that the government engaged in UMC.

5. The Government has conceded that the transmissions in specifications 5 and 7 were one transmission, although of voluminous records. The Court will leave those specifications as separate charges until after findings are announced. The Defense may make a motion to merge the specifications for findings at that time.

Category II: 18 U.S.C. § 641 and 18 U.S.C. § 1030(a)(1)
(Specifications 12 & 13 of Charge II)

1. The 18 U.S.C. § 641 and 18 U.S.C. § 1030(a)(1) specifications encompass distinctly separate criminal acts. The 18 U.S.C. § 641 offense is aimed at the theft of government property, in the present case records contained in government-owned databases, while the 18 U.S.C. § 1030(a)(1) offense requires the transmittal of classified information to unauthorized persons. The same rationale of paragraph (1) in Category I also applies to these offenses. The specification alleging a violation of 18 U.S.C. § 641 is directed at misconduct wholly independent of its paired specification alleging a violation of 18 U.S.C. § 1030(a)(1).

2. The number of charges and specifications do not misrepresent or exaggerate the accused's criminality. A singular act may implicate multiple and significant criminal law interests, none necessarily dependent upon the other. In this case, the crime of theft of government records can be complete whether or not the accused willfully 'communicated…..transmitted" the records to persons not entitled to receive them. The decision by the Government to charge the accused with theft of government property and exceeding authorized access on a computer and with transmitting classified information is a reasonable exercise of prosecutorial discretion.

3. The Court finds the number of charges and specifications do not unfairly increase the accused's punitive exposure for purposes of UMC for findings. Charging the accused with knowingly giving intelligence to the enemy, delivering national defense information to those unauthorized to receive it, theft of government property, and conduct prejudicial to good order and discipline, based on the accused's posting of classified information to a publicly accessible website, totaling hundreds of thousands of records, over the span of several months, is not an unreasonable multiplication of charges. The Article 104 offense has a maximum punishment of life confinement without the eligibility for parole. The Government could have broken up the single specification into multiple specifications based on specific Internet postings. Dismissal of Specification 12 would reduce the accused's punitive exposure by 10 years. Based on all of the above, the accused's punitive exposure has not been *unfairly* increased for purposes of UMC for findings. *See United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010).

4. There is no evidence of prosecutorial overreaching or abuse in the drafting of charges for the reasons set forth in paragraphs 1 3 above.

Category 3: Specifications Directed at Conduct That Occurred on the Same Day (Specifications 4, 5, 6 & 7 of Charge II) (Specifications 10 & 11 of Charge II)

1. The Defense concedes there is a factual dispute whether the conduct in specifications 10 and 11 of Charge II occurred on the same day or not.

2. The parties dispute whether the conduct at issue in specifications 4, 5, 6, and 7 of Charge II occurred on the same or separate days. Whether the enumerated specifications are directed at conduct that occurred on one day or different days is a factual matter that should be determined by the fact-finder after the close of the evidence. The Defense may re-raise this UMC motion after findings have been announced.

RULING: The Defense Motion to Dismiss Based on Unreasonable Multiplication of Charges for Findings is **DENIED**.

The Defense may re-raise the Motion to Dismiss for UMC for Findings and/or Sentence after announcement of the findings.

So ORDERED this 25th day of April 2012.

DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit